

No. 89-1652

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**

October Term, 1989

NORTH VALLEY BAPTIST CHURCH,

*Petitioner,*

v.

LINDA McMAHON, IN HER CAPACITY  
AS DIRECTOR OF THE CALIFORNIA  
STATE DEPARTMENT OF SOCIAL SERVICES,

*Respondent.*

On Petition For A Writ Of Certiorari  
From The United States Court Of  
Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED<sup>1</sup>

1. Does strict scrutiny in a free exercise of religion challenge require the religious claimant to devise and propose an alternative to the state's own regulatory scheme, or does the state have the burden of proving that its mechanism is the least restrictive means of accomplishing a compelling state interest?

2. Does strict scrutiny in a free exercise of religion challenge require a proposed accommodation to be the "best" alternative under all circumstances, or is it sufficient that it effectively advance a compelling state interest in the particular circumstances under consideration?

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<sup>1</sup> Respondent adopts petitioner's statement of questions presented and constitutional and regulatory provisions involved. These items are reprinted here for ease of reference.

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Respondent Linda McMahon, in her capacity as Director of the California State Department of Social Services, respectfully submits the following opposition to the Petition for Writ of Certiorari filed by petitioner, North Valley Baptist Church ("Church").

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## OPINIONS BELOW

The trial court decision issued below is published as *North Valley Baptist Church v. Linda McMahon*, (E.D. Cal. 1988) 696 F.Supp. 518. The decision of the United States Court of Appeals for the Ninth Circuit, from which this Petition for Writ of Certiorari arises, is published as *North Valley Baptist Church v. Linda McMahon*, (9th Cir.1989) 893 F.2d 1139.

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## JURISDICTION

The Supreme Court's jurisdiction to review this decision is conferred under 28 U.S.C. §1254.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right to the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land of naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment, Section One:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Health and Safety Code sections 1596.70, 1596.750, 1597.76, 1596.792, 1956.80, 1956.81, and 1956.90.<sup>2</sup>

California Code of Regulations<sup>3</sup>, Title 22, sections 101151, 101158, 101178.

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<sup>2</sup> Cal. Code of Regulations sections involved are set forth at pp. 52a - 57a of the Petition for Certiorari.

<sup>3</sup> Formerly entitled California Administrative Code.

### STATEMENT OF THE CASE

For purposes of this response only, respondent adopts petitioner's statement except as supplemented as follows:

Although the trial court concluded that the licensure requirement imposed a burden upon the Church, the Court also concluded that

"In our society the imposition of such a burden, quite rightfully, requires a state justification of the highest order. The state herein has more than sufficiently justified its action. The state has demonstrated its paramount concern for the health and safety of young children receiving out-of-home care in day care centers. Further, the state has demonstrated that recognition of an exemption from the licensing scheme would significantly impede its ability to promote such health and safety concerns."

(*North Valley Baptist Church v. Linda McMahon*, (E.D. Cal. 1988) 696 F.Supp. 518, 537; Petitioner's Appendix, Page 51a.)

In its opinion, the trial court discussed the fact that even though other states had chosen to utilize a registration alternative to licensing religiously affiliated day care centers, and some even have granted exemptions to such facilities, the trial court also concluded that this was of "little consequence" in this case since "California cannot be constitutionally compelled, against the wishes of its legislature, to grant a similar exemption." (*North Valley Baptist Church v. Linda McMahon*, (E.D. Cal. 1988) 696 F.Supp. 518, 529 - 530, Footnote 23; Petitioner's Appendix, Pages 30a - 31a.)

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## ARGUMENT

## I

THE COURT BELOW CORRECTLY DETERMINED THAT LICENSING IS THE LEAST RESTRICTIVE MEANS AVAILABLE TO THE STATE OF CALIFORNIA TO ENSURE THE HEALTH AND SAFETY OF ITS 400,000 CHILDREN IN DAY CARE FACILITIES.

It has never been disputed by the Church that the State of California has a compelling interest in protecting the health and safety of children in day care centers, and that the State of California may establish a regulatory scheme to advance that interest. The trial court found the interest of the State in protecting the health and safety of young children to be "compelling, [and] indeed paramount." (*North Valley Baptist Church v. Linda McMahon*, (E.D. Cal. 1988) 696 F.Supp. 518, 527; Petitioner's Appendix, Page 24a.)

The State of California does not dispute that appellant believes that to obtain and maintain a license to operate their day care facility would on their part be sinful in the eyes of their Lord (ER<sup>4</sup> 67 – See Undisputed Facts Nos. 3, 6, and 10).

The United States Court of Appeals for the Ninth Circuit developed a three-pronged test for the analysis of free exercise claims in the case of *EEOC v. Freemont Christian School* (9th Cir. 1986) 781 F.2d 1362, 1367. In that case, the Court stated that in balancing free exercise issues, the following factors should be considered:

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<sup>4</sup> In this brief, the letters ER will be used to designate references to the "Excerpt of Record".

- 1) The magnitude of the statute's impact upon the exercise of religious belief;
- 2) The existence of a compelling state interest justifying the burden imposed upon the exercise of the religious belief;
- 3) The extent to which recognition of an exemption from the statute could impede the objectives sought to be advanced by the state.

(*EEOC v. Freemont Christian School, supra*, 781 F.2d at p.1367 (citing *Wisconsin v. Yoder* (1972) 406 U.S. at 215 and *Sherbert v. Verner* (1963) 374 U.S. 398.) The trial court followed the Ninth Circuit analysis in *EEOC (North Valley Baptist Church v. Linda McMahon, supra* (E.D. Cal. 1988) 696 F.Supp: 518, 524; Petitioner's Appendix, Page 16a). Only the third prong of the *EEOC v. Freemont Schools* test need be addressed in this brief.

The Church argues in its petition that the courts below should not have utilized the type of balancing they did in reaching a decision as to whether the "least restrictive means" was employed by respondent in furthering a compelling state interest. If this Court were to accept this case, the only question to be decided would be whether on the facts of this case the courts below were correct in determining that licensing is the least restrictive means available to the State of California to protect the health and safety of children in day care. This issue is embodied in the third prong of the test stated in the *EEOC* case, and it was also the issue upon which this case was decided by the trial court. (*North Valley Baptist Church v. Linda McMahon*, (E.D. Cal. 1988) 696 F.Supp.518, 527; Petitioner's Appendix, Page 25a.)

An examination of the record can lead to no other conclusion than both the trial court and the court of appeals were correct in their determination.

## II

### IT WAS NOT THE DUTY OF THE STATE OF CALIFORNIA TO DEVELOP ALTERNATIVES TO LICENSING THAT MIGHT HAVE BEEN ACCEPTABLE TO THE NORTH VALLEY BAPTIST CHURCH

Contrary to the representations of the Church, the trial court properly considered only those alternatives to licensure which the Church suggested to be less restrictive and thus allegedly acceptable to them. It was not the obligation of the State of California to develop alternatives to licensing and submit them to the North Valley Baptist Church to see if they would pass the Church's scrutiny. It was the obligation of the State only to demonstrate that licensing was the least restrictive means by which it could adequately meet the health and safety requirements demanded by the California Legislature. The alternatives considered by the trial court were registration and the "laissez-faire" method – essentially the absence of any state regulation. Respondent is not aware of any other existing regulatory alternatives to licensing. Both alternatives were rejected by the trial court because they failed to advance the compelling interests of the State, that is, to protect the health and safety of children in day care. (*North Valley Baptist Church v. Linda McMahon*, (E.D. Cal. 1988) 696 F.Supp. 518, 530; Petitioner's Appendix, Page 32a.)

As noted by the trial court, the State faced the difficult situation of not ever having plaintiffs define for it

exactly what the Church wanted as an alternative to licensing (*North Valley Baptist Church v. Linda McMahon, supra*, (E.D. Cal. 1988) 696 F.Supp. 518, 527, 528; Petitioner's Appendix, Page 25a). At trial, the concept of registration was suggested by counsel for the Church as a form of "regulation" that would possibly be an acceptable alternative for regulation of its day care center. However, petitioner produced no evidence that true "registration" was used in any state for the regulation of traditional day care centers such as the Church's facility. In fact, the record reflects that true "registration" is not used in any state to regulate traditional day care centers (preschools), it is strictly used to regulate family day-care homes.<sup>5</sup> (RT: David Beard at 35.)

However, as the trial court noted in its opinion, registration would not be acceptable to the Church, petitioner herein, since one of the main reasons that having a license is objectionable is that it compels the Church to ask permission from the State to engage in a ministry the Church believes is mandated by God; (*North Valley Baptist Church v. Linda McMahon, supra*, (E.D. Cal. 1988) 696 F.Supp. 518, 527, 528; RT<sup>6</sup>: Royal Blue at 16, 17; Petitioner's Appendix, Page 27a, 28a). William C. Johnson,

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<sup>5</sup> As is noted in the opinion by the trial court, as supported by the testimony of licensing expert David Beard, there are some states that utilize a regulatory scheme under the rubric of "registration" but in fact these states are doing nothing different than what they would be doing if they were licensed. *North Valley Baptist Church v. Linda McMahon, supra* (E.D. Cal. 1988) 696 F. Supp. 518, 528. (RT: David Beard at 14).

<sup>6</sup> In this brief the letters RT will be used to designate references to the reporter's transcript which is a part of the record below.

the principal of the North Valley Christian School, testified during trial that even if all the regulations were waived, the Church would still not accept a license so that it could engage in its preschool ministry (RT: 127 – 128).

More importantly, the trial court held that even if registration would be acceptable to the Church, it would not “ . . . adequately advance the State’s objectives” of protecting the health and safety of children in day care (*North Valley Baptist Church v. Linda McMahon*, (E.D. Cal. 1988) 696 F.Supp. 518, 529; Petitioner’s Appendix, Page 27a – 28a). Expert testimony elicited at trial demonstrated that “if [registration is] going to be used at all, that [in a family day care setting] is where it should be used” (RT: David Beard at 35). There was further testimony that only the present system of regulation could adequately protect the health and safety of children in day care in California and that an exemption would preclude such protection by the Department (RT: David Beard at 36; RT: Fred Miller at 146). Based on the State’s experts’ testimony at trial, the trial court held that the adoption of

“ . . . registration as compared to licensure, would result in a negative outcome for children at the Preschool . . . [and that] the state’s objectives of ensuring high quality day care would be substantially impeded through the recognition of an exemption in the nature of registration.” (*North Valley Baptist Church v. Linda McMahon*, (E.D. Cal. 1988) 696 F.Supp. 518, 529; Petitioner’s Appendix, Page 30a.)

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## CONCLUSION

From the discussion presented in this brief, there can be no doubt that the courts below reached the correct decision when they determined that licensing of the North Valley Baptist Church Preschool was the least restrictive means available to the State of California to properly ensure the health and safety of the children receiving care at the Preschool. No other system of regulation available would protect the health and safety of children in day care to the level demanded by the State of California. The testimony of the experts produced at trial succinctly and compellingly established the necessity of having a uniform child day care licensing scheme in California. It was demonstrated through the testimony of expert witnesses that without licensing the health and safety of children in day care centers cannot properly be protected. Without the authority to require a license, to require adherence to the regulations adopted in accordance with statutes, and to use its enforcement powers, the State of California, through the Department of Social Services, would be unable to properly ensure the health and safety of the hundreds of thousands of children afforded day care in California, including the children at the North Valley Baptist Church Preschool. The system in use in California affords the minimum health and safety protection acceptable to the state Legislature. While other states may employ different and more lenient methods of regulating their day care centers, California must not be relegated to employing regulatory methods which have been determined by the Legislature not to meet the needs of the people of the State of California.

For the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Dated: May 21, 1990.

Respectfully submitted,

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